No. 13,141

IN THE

United States Court of Appeals

For the Ninth Circuit

FIBREBOARD PRODUCTS INC., a Corporation, et al.,

Appellant,

vs.

W. H. TOWNSEND,

Appellee.

Reply Brief of Appellant Fibreboard Products Inc.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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We have stated the essential facts of the case in our opening brief and therefore take issue with plaintiff's statement of facts only in the course of the ensuing argument.

I. NO CONTRACT EXISTED DUE TO UNCERTAINTY AS TO TERMS.

We have cited many cases to the effect that the terms of a contract must be certain and definite or the contract is not enforceable, with which plaintiff does not disagree. The issue then becomes a factual one. We have shown that there

is no evidence that the parties agreed to the employment of plaintiff on October 18, 1948. The finding of the District Court on that issue is contrary to the evidence. There could be no contract of employment on that date for there was no agreement on the job which was the subject of the contract. That uncertainty is fatal to plaintiff's case.

The only evidence of a possible agreement on a particular job was plaintiff's testimony relative to November 15, 1948, and at that date there could be no consideration for a promise by the defendant and the most that could have resulted would have been a relationship terminable at will. Plaintiff had to persuade the District Court the contract was entered on October 18 in order to justify a finding that the alleged agreement was not terminable at any time. This aspect is referred to later and we will proceed to analyze plaintiff's explanation of the lack of evidence to support the finding of the trial court.

Plaintiff's brief, despite petty distortions and misstatements, has been unable to demonstrate any proof of the definite terms of the contract the District Court found.

In the third paragraph of page 10 of the brief it is stated plaintiff was offered and accepted "the position in the pulp mill." That assertion is meaningless for there were many positions in the pulp mill and even the plaintiff stated none was specified until November 15th, after he had moved to California and about a month later than the date the District Court found a contract to have been entered (95, 96-7).

In the same paragraph it is asserted that, pursuant to the telephone conversation of October 18, Lindley told plaintiff he would be employed in the recovery department. The assertion is not true and the pages cited in support

of the assertion (138 and 196) may be searched in vain for proof of it. Even if the assertion were true, it does not specify which of the many jobs in the recovery department was intended.

The classification of plaintiff's application in defendant's records is not evidence of a contract. That act was something plaintiff had no knowledge of and Lindley was unable to state whether it was done before or after the October 18 telephone conversation (138). Lindley merely marked the application for a likely department from the standpoint of his experience. Again we point out the vast difference between a *department* and a specific *job*.

When plaintiff's brief progresses to the second paragraph of page 11, the job of recovery operator is first mentioned, but the reference to the evidence later in that paragraph again falls back upon the generalizations of "pulp mill" and "recovery department." The generalizations of the brief do not supply the evidence which is absent from the record.

The plant in question is composed of three main parts—a pulp mill and a paper mill and a wood room (113). Mr. Stitt further subdivided them as pulp mill, board mill, wood mill, maintenance, power and office (212). The total number of jobs is 400, of which 70 are in the pulp mill (193, 212). The pulp mill has, as one of its departments, a recovery department. In the recovery department are many individual jobs (221), such as digester cook, evaporator operator, tour foreman, board machine operator and so on. General reference to the subdivision pulp mill or to the department called recovery department are not references to a specific job. Discussion of a place where a per-

son might be employed is not the equivalent of an agreement to employ in a specific job.

Plaintiff has attempted to minimize the decision in *Mason v. Rose,* 176 F.2d 486, by accusing the 2nd Circuit Court, one of the most respected courts in the nation, of perverting the law: resorting to "Fireside Equity." Plaintiff would also distinguish the case, asserting that nothing was done under the alleged Rose-Mason contract. On the contrary, it appears from the opinion of the lower court that Mason came to the United States from England and could not get employment for a long time because of the existence of the alleged contract. The case is not to be explained away. It is excellent authority for the rule that an employment contract must be definite and certain in order to be valid and enforceable.

Plaintiff next goes all out for a proposition that is beside the point, i.e., that a contract is construed most strongly against the drafter. (Eight of the cases cited by plaintiff support this irrelevant argument.)

It seems quite clear that before a contract can be construed against its drafter there must be a contract to construe. Where is this contract? What are its terms? We have already shown that it is missing its indispensable subject matter, namely, the job in which defendant was supposed to hire plaintiff, and lacking in all of its essential terms except the forlorn claim that the duration was "permanent."

The power to construe a contract cannot be stretched to include supplying essential terms that the evidence shows were not agreed on. This alleged contract died aborning and there is nothing to construe.

Even if the rule plaintiff urges were in fact applicable, how would it be applied? Did not the plaintiff himself write the first letter on August 20 and apply for "one of the jobs" at the new plant (39, p. 1)? Against whom but the plaintiff is that ambiguity to be construed?

Did not the plaintiff write a second letter on September 7 in which he stated he would appreciate "any job you people have to offer me" (90 D-A)? Against whom is that uncertainty to be construed?

Did not the plaintiff draft both those letters?

Did not the plaintiff file an application which stated, as to kind of work desired, "pulp mill tour foreman" (93 D-B)? The evidence shows that tour foreman is not the same job as recovery operator. Against whom then is that document to be strongly construed?

Plaintiff posed the rhetorical question of who could have made this contract more definite. The answer is quite plain that he could have. But he knew very well that he was not contracting for a job in that correspondence. He was just negotiating. Neither his correspondence nor the defendant's amounted to anything more than that. Belaboring the letters to make them seem something they are not cannot supply the proof of an agreement between the parties as to any definitely ascertainable employment.

This plaintiff has testified unequivocally that the job of recovery operator was never mentioned until after he arrived in California and that he then selected the job when he was offered his choice (95, 96-7, 54, 55). This occurrence, according to plaintiff's own testimony, was on November 15, nearly a month later than the date when the District Court found that agreement on the recovery operator job had been reached.

It is clear and unmistakable that these parties simply had not agreed on employment of the plaintiff when he undertook to move himself to the place where the plant was being built. The contrary findings of the District Court are without basis in the evidence and are contrary to the evidence.

We have shown that plaintiff's correspondence does not mention the job of recovery operator. We have also shown that defendant's letter of September 1 (41 P-2) cautioned plaintiff that the company was making no commitments, and the letter of October 19 (45 P-3) advising plaintiff that he might have *temporary* work, made *no mention* of *permanent* employment. It had as its subject a phrase which would clearly illumine the mind of a reasonable man to the fact that it was not a contract of employment:

"*Possibility* of Employment in Recovery Department" (emphasis supplied).

The only *certain* thing in the exchange of correspondence is that the parties had *not* agreed to plaintiff's employment. That is made doubly clear when the letters are read in connection with plaintiff's testimony of the conversation of October 18:

> "Q. (By Mr. Holmes): When did Mr. Lindley say anything to you about the job as recovery operator?
>
> A. On the 15th of November.
>
> Q. He didn't say anything about the recovery operator's job in your telephone conversation?
>
> A. No, sir; he told me Mr. Stitt had given him my recommendation from the North Carolina Pulp Company and my application for employment and it seemed I was an experienced Kraft pulp mill man.
>
> Q. He didn't promise you any particular job at all?
>
> A. That's right.

Q. You didn't know what it would be?

A. Presumably it would be a tour foreman's job. That was the last job I had.

Q. Which was what you applied for?

A. Yes, sir.

Q. That is what you wanted?

A. That is what I wanted.

Q. He didn't promise you that or any other job on October 18th. [73]

A. No, sir; he just told me if I would come down they would place me in one of the other mills until such time, and that I could work in that until it was open, and I could stay here and the company would help me buy a home if I wasn't able to buy one." (96-7)

II. LIABILITY OF DEFENDANT WAS DISCHARGED BY PLAINTIFF'S REJECTION OF AN OFFER OF PERFORMANCE.

Plaintiff has admitted that he was offered a job at the plant on August 31, 1950 (should read 1949) (Brief, p. 15). We have asserted that, since no specific job was ever agreed to, that offer, which was rejected, discharged any obligation to him. Plaintiff's attempt to find an admission of responsibility in that offer is without merit and the analogy to criminal law is not worthy of reply. Our assertion stands unrefuted.

III. THE ALLEGED CONTRACT WAS UNENFORCEABLE FOR LACK OF MUTUALITY.

The plaintiff seeks to meet our argument on lack of mutuality by twisting this case into a unilateral contract which became bilateral. Plaintiff misses the point. The lack of mutuality lay in the absolute right reserved by plaintiff to quit at any time. He did not bring himself

within the theory of the case of *Brawley v. Crosby Research Foundation,* 73 C.A.2d 302, for in that case 60 days' notice of termination was required and the defendant had to pay minimum royalties during that period. The theory of mutuality and consideration in that type of case has no applicability where no notice of termination is required and the power to end the alleged agreement at any time is absolutely reserved. If there is a requirement to perform during a stated period before the termination notice becomes effective, both mutuality and consideration are present. However, when the unconditional power to terminate at will is reserved, the difference between mutuality and consideration is clear. Consideration is present so long as the person performs, but mutuality is never present. Under plaintiff's theory here defendant was supposed to be bound permanently, but plaintiff was to be bound only so long as he chose to be and there is not even the requirement of reasonable notice to give a semblance of mutuality. The law does not enforce such contract.

In the matter of *Pike v. Hayden,* 97 C.A.2d 609, the only thing lacking was the formal written lease, which the lessor himself had withheld; his own default could not give rise to the defense of lack of mutuality. Here the terms of the contract are not proved and the right of plaintiff to end the alleged agreement at any time is established by his own testimony, elements which were not raised or considered in the *Pike* case.

Our argument on this phase of the case is supported by a number of well-considered cases which plaintiff has ignored. We need not repeat the application of the sound principles they stand for; it is sufficiently discussed in our

opening brief and is neither refuted nor distinguished by plaintiff.

IV. THE ALLEGED CONTRACT WAS FOR AN INDEFINITE TIME AND WAS UNENFORCEABLE AS IT WAS TERMINABLE AT THE WILL OF EITHER PARTY.

Plaintiff asserts that the alleged contract in this case is within the exception to the rule that contracts of employment for an indefinite period are terminable at the will of either party. It is claimed that there was consideration, as in *Seifert v. Arnold Bros. Inc.,* 138 C.A. 324, and in *Millsap v. Natl. Funding Corp.,* 57 C.A.2d 772. The narrow field of those cases is stated at 57 C.A.2d 776 to be the situation "where the prospective employee clearly states to his employer * * * that he will not give up his present employment unless the prospective employer will agree to give him permanent employment and the prospective employer expressly agrees to those terms * * *"

This plaintiff gave up a temporary job which would have expired in a week or two. *Thacker v. American Foundry,* 78 C.A.2d 76, at 85, shows that to be insufficient consideration to come within the *Millsap* doctrine. That the giving up of employment held only at will is of no legal significance is discussed below in connection with *Ruinello v. Murray,* 36 C.2d 687, on the statute of frauds issue.

Plaintiff has attempted to show his great bargaining power in getting defendant to make the alleged promise to him by distorting the importance of certain facts. For example, Stitt, the manager, answered his letter. But Stitt had nothing to do at the time but send out form letters to applicants, for the plant was far from built and he had no one to do it for him (208-9). Contrary to plaintiff's asser-

tion, defendant did not need any men desperately, let alone 300. The evidence showed that only 25 out of 68 in the pulp mill were to be hired from out of the area (146-7) and, when plaintiff first wrote, the plant opening was not expected for six months. In answering this part of our argument plaintiff passes on to foolish and exaggerated assumptions which are without basis in the evidence and required no discussion.

No reasonable man could believe that a contract of employment was agreed to in the exchanges of correspondence exhibited in this case, but plaintiff's eagerness to get at the head of the line when the new plant opened led him to move to California. He speculated he could have gone to North Carolina with his last employer, but that speculation has no evidentiary value. An express contract of employment must be shown by something more than deductions and conclusions of the witnesses. *Townsend v. Flotill Products, Inc.*, 82 C.A.2d 863, 866. His history is entirely consistent with his action in moving to California. He was not rooted anywhere and had no prospects where he found himself in 1948. The facts show that, at the time he first wrote to defendant, he was working as a helper on an elevator construction job which lasted three months. Prior to that job he had spent three years in about eight short-term jobs in several industries (no pulp or paper mills) in several different states. He had worked in a pulp and paper mill from 1928 to 1935 and from 1937 to 1945. By 1948 he had not been in the industry for three years and had not operated machinery as a worker since 1940 (86-90, and 94, D-B).

Plaintiff hurriedly departed for California even though he knew that no particular job was discussed in his telephone conversation and none was mentioned in the letter he received after that. In view of those facts he could not have been induced to move to California by any prospect of a job as recovery operator. He moved at his own risk and on his own speculation. Therefore his move could not be consideration sufficient to place the alleged agreement in the exception to the rule that indefinite term contracts are terminable at will. On November 15, when, plaintiff testified, he selected the job of recovery operator, he was just another volunteer appearing at the plant and there was no consideration for any promise on that date. If migrating to California from Alabama could be considered a detriment, which we doubt, it was one voluntarily undertaken by the plaintiff and not a result of any promise of a job as recovery operator.

We submit that the general rule applies here and, no contract having been entered upon a consideration, the relation of the parties was terminable at any time, even before employment began. The facts are very similar to *Standing v. Morosco,* 43 C.A. 244, where the plaintiff ended employment in another state and moved to California and the court found there was no enforceable contract.

V. THE ALLEGED CONTRACT IS UNENFORCEABLE DUE TO THE STATUTE OF FRAUDS.

The statute of frauds raises problems which plaintiff has not even tried to answer.

In the first place the requirement of an adequate memorandum setting forth the essentials of the agreement,

signed by the party to be charged, is not met. We have already discussed the only writings in this case and their inadequacy to show the terms of a contract. It is sufficient merely to refer to *Ellis v. Klaff,* 96 C.A.2d 471.

Plaintiff cited *Columbia Pictures Corp. v. DeToth,* 87 C.A.2d 620, for a proposition it does not stand for. To be outside the statute of frauds, an oral contract must be capable, by its terms, of being performed within a year. If by its terms it is not to be performed within a year, it is within the statute. Plaintiff has not shown, and cannot show, how a contract for two years' employment can be performed in a year.

Plaintiff argues that death could intervene within a year and thus a contract for permanent employment would be fulfilled. Plaintiff fails to take into consideration the difference between employment "for life," and "permanent" employment. Employment "for life" is subject to the contingency of death and the happening of the contingency would provide full performance. "Permanent" employment, on the other hand, is not a contract upon a contingency. Death merely excuses full performance. It is an excuse for non-performance; it is not performance of the contract.

The blunted legal reasoning of some courts has failed to recognize this distinction, but it is sound and is recognized even by the text plaintiff relies on (American Jurisprudence). See 49 Am. Jur. 410. Plaintiff referred to Section 51 of the article on statute of frauds in that volume, but apparently failed to read Section 52. The last sentence of the latter section states that the cases relied on for plaintiff's view "are no longer regarded as of controlling effect." It is to be further noted that in none of the old cases sup-

porting plaintiff's view is there a finding, and state decisions to support such finding, that "permanent" means two years, as was found by the District Court on the authority of the *Millsap* case.

The alleged contract that plaintiff sues on was, according to his contentions and according to the finding of the District Court, a "permanent" contract and it was further found that "permanent" means two years. Therefore, the object to be accomplished by the alleged contract could not have been completed within one year and the statute applies.

Plaintiff next urges that the statute does not apply due to some estoppel. The application of the rule is not developed in the brief, making it difficult to answer the assertion, but we respectfully point out that the District Court was not persuaded that any estoppel was involved in the case for it made no finding thereon. The complete answer to plaintiff's argument on estoppel is contained in the decision of the Supreme Court in *Ruinello v. Murray,* 36 C.2d 687, 227 P.2d 251. It is apparent that the looseness of some courts in finding an estoppel is not in accordance with the law as viewed by the California Supreme Court.

The facts here do not show any unjust enrichment of defendant through a failure to hire plaintiff as recovery operator or any unconscionable injury, and the District Court found none. The job plaintiff thought he might have continued by moving to North Carolina is not a sufficient detriment under the *Ruinello* case. The special damages plaintiff sought were not the result of any unconscionable injury for the District Court specifically found they were not promised him. (See Order for Judgment, 30.) Plaintiff's

move to California took place after his receipt of a letter which promised at most temporary employment and he was not induced to move by any promise of a permanent job. If the migration could be considered an injury, it did not result from defendant's representations. It is to be noted in this connection that "unconscionable injury" must be substantial injustice and not the slight detriment which might be sufficient as consideration for a promise. The facts both as found by the District Court and as disclosed by the evidence do not support an estoppel to plead the statute. It is a complete defense.

At this point in his brief plaintiff raised again the irrelevant issue disposed of above concerning construction of a written instrument and then suggested that part performance removes the alleged contract from the operation of the statute. We are unable to see in the citations in the brief any support for this argument. Plaintiff ignores the California cases directly on the point, which establish the law diametrically opposite to his argument. Part performance of an employment contract does not render the contract valid and enforceable. Even *Seymour v. Oelrichs* recognized that. See 156 C. at 793. The principle is recognized again in the *Ruinello* case for the plaintiff there had quit what he alleged was a "permanent life-time position" and had worked in the service of the defendant and he still could not state a cause of action for breach of contract.

If there ever was an employment "contract" to which the statute of frauds should be applied, this is the case. The makeshift of stray fact and active fancy pieced together by the loquacious aggressiveness of this plaintiff (only faintly revealed in cold type) is just what the statute

of frauds was designed to protect against. The play upon sympathy, the demagogic comparison of the economic circumstances of the parties, the hyper-imaginative imputations of evil motives to defendant's employees, displayed in plantiff's brief, all exemplify reasons for the existence and operation of the statute. The statute of frauds was meant to protect against such claims as this plaintiff's and this Court should unhesitantly apply it. The alleged contract fails to meet the standards set by law and is invalid and unenforceable.

VI. CONCLUSION.

We have demonstrated herein and in our opening brief that no contract, oral or written, was entered between these parties, for the subject of the contract, the job plaintiff claims he was hired for, was never agreed upon. There is absolutely no evidence that they agreed on October 18, 1948, that he would be employed as a recovery operator.

The written documents fail to meet the requirements of the statute of frauds and plaintiff has not shown that that statute does not apply.

Even were the plaintiff able to meet these two issues successfully his action would still fail for he has shown no excuse for his failure to accept an offered job and any alleged contract would lack mutuality and would be terminable at will without liability.

This Court should reverse the judgment upon any of these grounds for each is sound and well-supported, but primary among them is the failure of proof that any contract was entered.

The judgment of the District Court should be reversed and that Court should be directed to enter judgment for defendant for its costs.

Dated: San Francisco, California, March 10, 1952.

Respectfully submitted,

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